TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 139

SIDNEY MANDELBAUM, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED JULY 17, 1924

(30,507)

(30,507)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 542

SIDNEY MANDELBAUM, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

	Page
Proceedings in United States circuit court of appeals for eighth circuit	*a*
Caption.....(omitted in printing)	*a*
Record from the district court of the United States, southern district of Iowa	1
Citation and service	1
Petition	2
Exhibit A—Assignment, Estella Mandelbaum to Sidney Mandelbaum, March 12, 1923	7
Exhibit B—Assignment, J. Mandelbaum & Sons to Sidney Mandelbaum, March 12, 1923	8
Exhibit C—Assignment, Morris Mandelbaum to Sidney Mandelbaum, March 12, 1923	8
Exhibit D—Assignment, Julius Mandelbaum to Sidney Mandelbaum, March 12, 1923	9
Amendment to petition	9
Exhibit A—Photographic copy of blank form of U. S. War Savings Certificate	11
Motion to dismiss	14

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	Page
Second amendment to petition	14
Judgment	15
Petition for and order allowing appeal	16
Assignment of errors	17
Bond on appeal	19
Præcipe for transcript of record	20
Clerk's certificate	22
Opinion, Stone, J.	23
Decree	25
Petition for appeal	25
Assignment of errors	26
Order allowing appeal	28
Bond on appeal (omitted in printing)	29
Citation and service (omitted in printing)	29
Præcipe for transcript of record	29
Clerk's certificate	30

1 (Citation and Acceptance of service.)

(Filed in the U. S. District Court on June 8, 1923.)

In the District Court of the United States in and for the Southern District of Iowa, Central Division, Sitting at Des Moines.

Sidney Mandelbaum, Plaintiff,
No. 4222. vs. In Equity.
The United States of America, Defendant.

To The United States of America—Greeting:

You are hereby cited and notified to be and appear at the United States Circuit Court of Appeals to be held at the City of St. Louis, in the State of Missouri, 60 days from and after the day this citation bears date, pursuant to an order allowing an appeal filed and entered in the office of the Clerk of the District Court of the United States, for the Southern District of Iowa, Central Division, from a final order, judgment and decree signed, filed and entered on the 23rd day of May A. D. 1923, in that certain suit, being Equity No. 4222, wherein Sidney Mandelbaum is plaintiff and The United States of America is defendant, and appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Martin J. Wade, United States District Judge for the Southern District of Iowa, this 8th day of June A. D. 1923.

MARTIN J. WADE,
United States District Judge for the
Southern District of Iowa.

Acceptance of Service.

Service of the above and foregoing Citation on Appeal is accepted and receipt of copy of the same acknowledged, on this the 8 day of June A. D. 1923.

JOHN C. DE MAR,
Asst. United States District Attorney,
Attorney for Defendant.

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3 Pleas And Proceedings before the Honorable Martin J. Wade, Judge of the District Court of the United States for the Southern District of Iowa, in a cause lately pending in said Court wherein Sidney Mandelbaum is plaintiff and The United States of America is defendant, being numbered 4222—Equity, Central Division.

Be It Remembered that on the 17th day of March, A. D. 1923, a petition in Equity was filed in the case of Sidney Mandelbaum against the United States of America, in said Court at Des Moines, Iowa, which said petition in Equity is in words and figures as follows:

4 (Petition.)

(Filed in the U. S. District Court on March 17, 1923.)

In the District Court of the United States in and for the Southern District of Iowa, Central Division, Sitting at Des Moines, Iowa.

Sidney Mandelbaum, Plaintiff,
vs.
The United States of America, Defendant.

To the Honorable, the Judge of the District Court of the United States for the Southern District of Iowa:

Humbly complaining, for cause of action against the defendant, the plaintiff states:

1. That he is a Citizen of the United States of America, and a domiciled resident of the City of Des Moines, the County of Polk, and the State of Iowa: that he is the father, and the duly appointed, qualified and acting guardian of Miriam Mandelbaum and Elanor Mandelbaum, who are minors, and brings this suit, not only in his own name and on his own behalf, but also as the father and legal guardian of said minors, and that the suit is brought and prosecuted against
5 the United States of America, in this, its District Court, in and for the Southern District of Iowa, Cen-

tral Division, by express authority of the Congress of said United States, and, particularly under the provisions of Section 145, and the 20th Paragraph of Section 24 of "The Judicial Code."

First Purchase of War Savings Certificates and Stamps.

2. That, on or about April 26, 1918, at the solicitation of the defendant, and in response to an earnest and oft-repeated appeal of its Secretary of the Treasury, and other of its officials and agents, to all patriotic citizens, for financial aid in the prosecution of the then pending war with Germany, were purchased, and paid for in cash, or its equivalent, through the defendant's fiscal agent at Des Moines, Iowa, viz., The Iowa National Bank of Des Moines, United States "War Savings Certificates," of the Series of 1918, each having pasted thereon twenty, five-dollar ($5.00) War Savings Certificate Stamps," firmly affixed thereto and made an integral part thereof, as follows:

(A) By the plaintiff, Sidney Mandelbaum, ten (10) Certificates, numbers unknown to plaintiff, purchase price, Eight Hundred Thirty Dollars ($830.00), amount due and payable thereon on date of maturity, viz., January 1, 1923, One Thousand Dollars, ($1000.00).

(B) By plaintiff's wife, Estella Mandelbaum, ten (10) Certificates, numbers unknown to plaintiff, purchase price, Eight Hundred Thirty Dollars ($830.00), amount due and payable thereon on date of maturity, viz., January 1, 1923, One Thousand Dollars, ($1000.00).

(C) By plaintiff's minor daughter, Miriam Mandelbaum, Two (2) Certificates, numbers unknown to plaintiff, purchase price, One Hundred Sixty-six Dollars, ($166.00),
6 amount due and payable thereon on date of maturity, viz., January 1, 1923, Two Hundred Dollars, ($200.00).

(D) By plaintiff's minor daughter, Eleanor Mandelbaum, One (1) Certificate, number unknown to plaintiff, purchase price, Eighty-three Dollars ($83.00), amount due and payable thereon on date of maturity, viz., January 1, 1923, One Hundred Dollars, ($100.00).

3. That the Ten (10) Certificates purchased by the plaintiff, as aforesaid, and the debt of the defendant, evidenced thereby, are still the property of the plaintiff; that the Ten (10) Certificates purchased by Estella Mandelbaum, as aforesaid, and the debt of the defendant evidenced thereby, were subsequently to the date of their maturity, sold, assigned

in writing, and transferred to plaintiff, and that the Three (3) Certificates purchased by the plaintiff's minor daughters, Miriam Mandelbaum and Eleanor Mandelbaum, as aforesaid, have never been sold, assigned or transferred by them, or by anyone acting in their behalf, and are now the property of the plaintiff as guardian of said minors.

4. That each and all of the "War Savings Certificates" and "War Savings Certificate Stamps" aforesaid, and all claims and demands predicated thereon are now the property of the plaintiff; that they are long past due and payable; that payment thereof has often been demanded, and that payment thereof has been and is refused.

Second Purchase of War Savings Certificates and Stamps.

5. That on or about April 29, 1918, at the solicitation of the defendant, and in response to the same appeal as
7 that above described, were purchased, and paid for in cash or its equivalent, through the defendant's same fiscal agent, viz., The Iowa National Bank of Des Moines, United States "War Savings Certificates" of the Series of 1918, each having pasted thereon twenty, five-dollar ($5.00) "War Savings Certificate Stamps," firmly affixed thereto and made an integral part thereof, as follows:

(A) By J. Mandelbaum & Sons, a mercantile corporation, duly organized and existing, as a corporation for pecuniary profit, under the laws of the State of Iowa, with its home office and principal place of business at the City of Des Moines, Polk County, Iowa, Ten (10) Certificates—Numbers 11, 974, 261 to 11, 974, 270 inclusive—purchase price, Eight Hundred Thirty Dollars, ($830.00) amount due and payable thereon on date of maturity, viz., January 1, 1923, One Thousand Dollars, ($1000.00).

(B) By Morris Mandelbaum, Ten (10) Certificates—Numbers 12, 696, 583 to 12, 696, 591, inclusive, and Numbers 8, 798, 202—purchase price, Eight Hundred Thirty Dollars ($830.00), amount due and payable thereon on date of maturity, viz., January 1, 1923, One Thousand Dollars ($1000.00).

(C) By Julius Mandelbaum, Ten (10) Certificates—Numbers 12, 696, 603 to 12, 696, 612, inclusive—purchase price, Eight Hundred Thirty Dollars ($830.00), amount due and payable thereon on date of maturity, viz., January 1, 1923; One Thousand Dollars ($1000.00).

6. That the Ten (10) Certificates purchased by J. Mandelbaum & Sons, the Ten (10) Certificates purchased by Morris Mandelbaum, and the Ten (10) Certificates purchased by Julius Mandelbaum, as above set forth, and the debts of the defendant evidenced thereby, were, subsequently to the date of their maturity, sold, assigned, in writing, and transferred to plaintiff.

7. That each and all of the "War Savings Certifi-
8 cates" and "War Savings Certificates Stamps," described in the last two preceding paragraphs hereof, and all claims and demands predicated thereon, are now the property of the plaintiff; that they are long past due and payable: that payment thereof has often been demanded, and that payment thereof has been and is refused.

Allegations Common to Both of the Above Purchases.

8. That the "War Savings Cetificates" and "War Savings Certificate Stamps" aforesaid, have been lost, in the manner hereinafter more fully described, and for this reason profert thereof cannot be made, nor is it possible for plaintiff to attach hereto copies thereof, but the plaintiff avers that they and all of them were of the form used and floated generally throughout the country by the defendant, in its so-called "Series of 1918," during the month of April, 1918, the contents of which will be proven on the trial of the cause; but the plaintiff can, and does, aver the fact to be that, upon the front page of each of said "War Savings Certificates," over the signature of Wm. G. McAdoo, Secretary of the Treasury, and the date, "January 2, 1918," was the following legend:

"This certifies that, subject to the terms and conditions printed hereon, the owner named on the back hereof will be entitled to receive on January 1, 1923, in respect of each United States War Savings Certificate Stamp of the Series of 1918 then affixed hereto, the amount indicated thereon as then payable, or, at his option, will be entitled to receive at any earlier date, in respect of each such stamp then affixed hereto, the lesser amount indicated in the table printed hereon."

and that, among the "Terms and Conditions" printed
9 upon each of said Certificates, were the following provisions:

"2. This Certificate is of no value except to the owner named hereon, and is not transferable.

* * * *

3. This Certificate may be registered at any post office of the first, second or third class, subject to such regulations as the Postmaster General may prescribe. Unless registered, the United States will not be liable if payment be made to a person not the rightful owner.

5. This Certificate, if not registered, is payable at any money order postoffice, and, on January 1, 1923, at the Treasury Department in Washington, but if registered is payable only at the postoffice where registered."

9. That upon each of the lost Certificates aforesaid, appears in writing the name of its purchaser and owner, as above set forth; that none of said Certificates was either sold, assigned, or transferred, either in whole or in part, by the original purchaser until after their date of maturity, and then only to the plaintiff herein, as hereinbefore set forth, and that none of them was ever registered according to the regulations of the Postmaster General of the United States, or otherwise.

10. Further, the plaintiff shows to this Honorable Court, and states: that, on April 3, 1922, between the hours of 1:00 and 4:00 o'clock A. M., armed men, whose names are unknown to the plaintiff broke and entered into the dry goods store of J. Mandelbaum & Sons, located at Nos. 507, 509 and 511 West Walnut Street, Des Moines, overpowered the janitor and one night watchman of the store and building, broke open the iron safe in which, for safe-keeping, the War Savings Certificates and Stamps above described were deposited, and took, stole and carried away, each and all of said Certificates and Stamps, and that, since said last mentioned date, neither the plaintiff nor any of the original purchasers, notwithstanding diligent efforts so to do, has been able to obtain possession of or to locate them.

11. That, on or about May 1, 1922, the general postoffice of the United States at Washington, D. C., the postoffice at Des Moines, and each of the postoffice clearing house stations through which War Savings Stamps are redeemable, were notified of the theft and loss of the Certificates and Stamps above described, by the original purchasers thereof, but that, so far as plaintiff knows, nothing of their whereabouts, if they still exist, has been heard, nor has the plaintiff been able to locate them, after diligent search.

12. That Exhibits "A", "B", "C", and "D" hereto attached and made a part hereof, are copies of the written assignments of Estella Mandelbaum, J. Mandelbaum & Sons,

Morris Mandelbaum, and Julius Mandelbaum, respectively, to the plaintiff, mentioned in Paragraphs 3 and 6 hereof.

13. That, as a condition precedent to a recovery of the "War Savings Certificates" and "War Savings Certificate Stamps," lost as hereinbefore set forth, the plaintiff is ready, able and willing, and now offers to make and execute to the defendant an ample and sufficient bond, to hold it harmless from any and all other liability upon said Certificates and stamps, should the Court so order and direct, and to do all else that equity and good conscience may require of him.

11 Wherefore, the Plaintiff Prays:

That a reexecution of the "War Savings Certificates" and "War Savings Certificate Stamps," described in the foregoing petition, be decreed and the liability of the defendant to plaintiff thereon adjudged and decreed, that plaintiff have judgment, or an order for payment, for the amount due him thereon, to wit, for Fifty Three Hundred Dollars ($5300.00), with interest thereon from and after January 1, 1923, at the rate of 6% per annum, and that he have such other and further relief as he may be entitled to in equity, including judgment for the costs of this action.

(Sgd.) H. L. BUMP,
Attorney for Plaintiff.

Verification.

State of Iowa,
Polk County.—ss.

I, Sidney Mandelbaum, being first duly sworn on oath depose and say that I am the plaintiff in the above entitled cause of action; that I have read the foregoing petition; that I know the facts stated in said petition, and that the allegations thereof are true as I verily believe.

(Sgd.) SIDNEY MANDELBAUM.

Subscribed and sworn to before me by the said Sidney Mandelbaum, this 15th day of March, A. D., 1923.

(Sgd.) L. M. WICKER,
(Seal) Notary Public within and for Polk County, Iowa.

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12 Exhibit "A".

For value received, I, Estella Mandelbaum, of the City of Des Moines, Polk County, Iowa, hereby sell, assign and

transfer unto Sidney Mandelbaum of the same City, the ten (10) United States "War Savings Certificates," and the twenty (20) five-dollar ($5.00) "War Savings Certificate Stamps" thereto attached, dated January 1, 1918, purchased by and issued to me on or about April 26, 1918, together with all claims and demands against the United States of America evidenced thereby, and hereby authorize and empower said Sidney Mandelbaum to demand, sue and receipt for all sums of money now due and payable upon said Certificates and Stamps.

Dated this 12th day of March, A. D., 1923.

ESTELLA MANDELBAUM.

Exhibit "B".

For value received, the undersigned, J. Mandelbaum & Sons, a mercantile corporation, duly organized and existing as a corporation of pecuniary profit, under the laws of the State of Iowa, with its home office and principal place of business in the City of Des Moines, Polk County, Iowa, does hereby sell, assign, and transfer unto Sidney Mandelbaum of the same City, the ten (10) United States "War Savings Certificates," and the Twenty (20) five-dollar ($5.00) "War Savings Certificate Stamps" thereto attached, dated January 1, 1918, purchased by and issued to said corporation on or about April 29, 1918, together with all claims and demands against the United States of America evidenced thereby, and hereby authorizes and empowers said Sidney Mandel-
13 baum to demand, sue and receipt for all sums of money now due and payable upon said Certificates and Stamps.

Dated this 12th day of March, A. D., 1923.

J. MANDELBAUM & SONS,
By M. Mandelbaum, Vice President.

Attest: Mose Cohen,
Secretary.

Exhibit "C".

For value received, I, Morris Mandelbaum, of the City of Des Moines, Polk County, Iowa, hereby sell, assign and transfer unto Sidney Mandelbaum, of the same City, the ten (10) United States "War Savings Certificates" and the twenty

(20) five-dollar ($5.00) "War Savings Certificate Stamps" thereto attached, dated January 1, 1918, purchased by and issued to me on or about April 29, 1918, together with all claims and demands against the United States of America evidenced thereby, and hereby authorize and empower said Sidney Mandelbaum to demand, sue and receipt for all sums of money now due and payable upon said Certificates and Stamps.

Dated this 12th day of March, A. D. 1923.

MORRIS MANDELBAUM.

Exhibit "D".

For value received, I, Julius Mandelbaum, of the City of Des Moines, Polk County, Iowa, hereby sell, assign and transfer unto Sidney Mandelbaum, of the same City, the ten (10) United States "War Savings Certificates," and the twenty (20) five-dollar ($5.00) "War Savings Certificate Stamps" thereto attached, dated January 1, 1918, purchased by and issued to me on or about April 29, 1918, together with all claims and demands against the United States of America evidenced thereby, and hereby authorize and empower said Sidney Mandelbaum to demand, sue and receipt for all sums of money now due and payable upon said Certificates and Stamps.

Dated this 12th day of March, A. D. 1923.

JULIUS MANDELBAUM,
By Morris Mandelbaum,
Attorney in Fact.

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15 Amendment to Petition.

Sidney Mandelbaum, Plaintiff,
No. 4222. vs. Equity.
The United States of America, Defendant.

Comes now the plaintiff and amends his original petition by adding thereto, after the last line in Paragraph 8 of the said petition, the following:

"That the plaintiff attaches hereto, a photographic copy of a certificate identical with the certificates owned by the plaintiff and his assignors, which were stolen as aforesaid, save and except that each of the certificates owned by the plaintiff and his assignors had attached to them twenty of the United States War Savings Certificate Stamps, which photographic copy, marked Exhibit "A" is by this reference

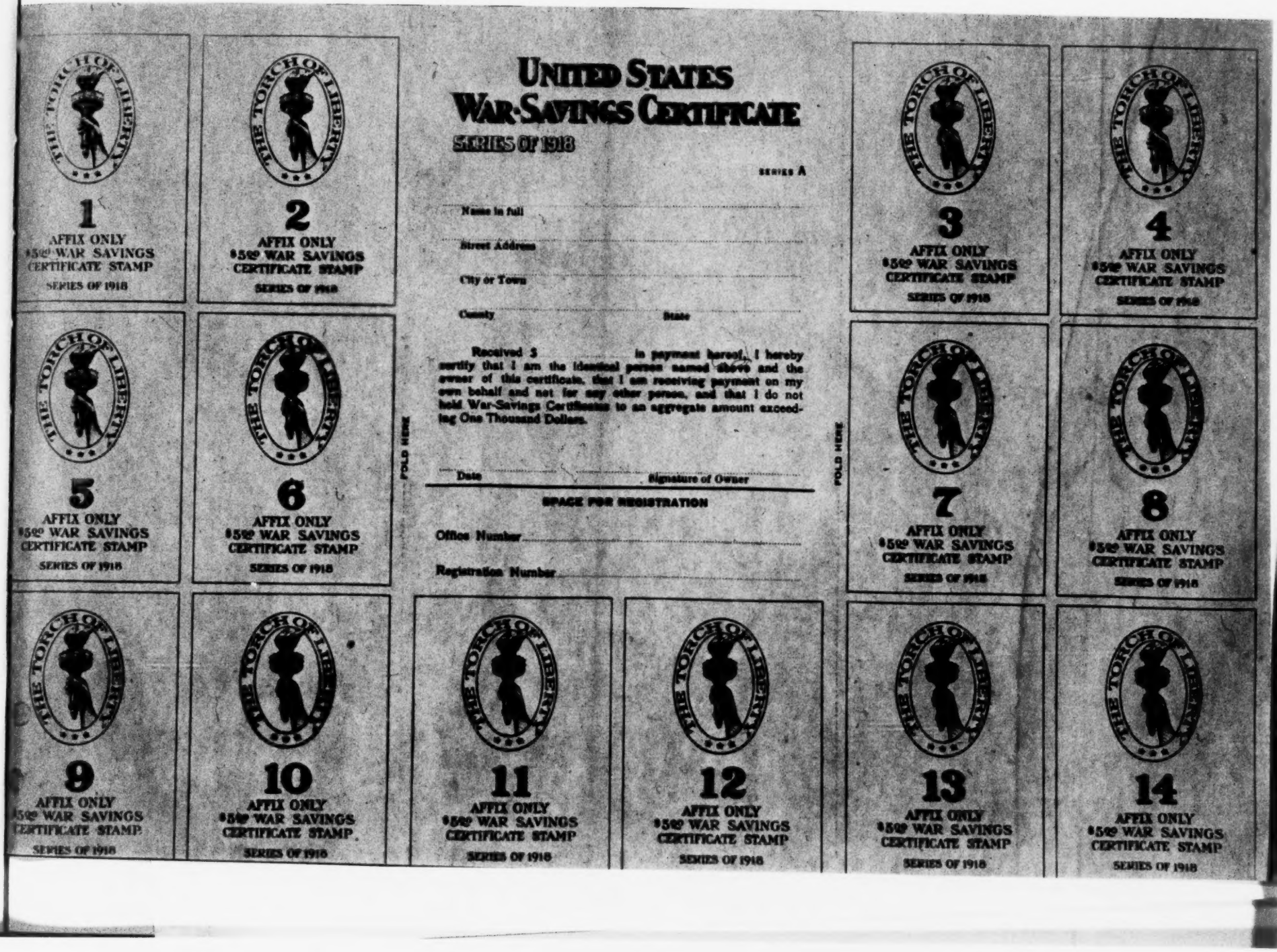
made a part of this petition, with same force and effect as if all the statements and conditions shown thereon were fully and completely set out herein."

(Sgd.) HOWARD L. BUMP,
Attorneys for Plaintiff.

Service of the foregoing Amendment to Petition is accepted and copy thereof received this 12th day of May, A. D. 1923.

(Sgd.) RALPH PRINGLE,
U. S. District Attorney for Southern District of Iowa, Attorney for Defendant.

Endorsed and filed May 12th, 1923, N. F. Reed, Clerk, By Minnie Shill, Deputy.


THE TORCH OF LIBERTY
1
AFFIX ONLY
$5.00 WAR SAVINGS
CERTIFICATE STAMP
SERIES OF 1918
2
AFFIX ONLY
$5.00 WAR SAVINGS
CERTIFICATE STAMP
SERIES OF 1918
UNITED STATES
WAR-SAVINGS CERTIFICATE
SERIES OF 1918
SERIES A
Name in full
Street Address
City or Town
County
State
Received $ in payment hereof, I hereby certify that I am the identical person named above and the owner of this certificate, that I am receiving payment on my own behalf and not for any other person, and that I do not hold War-Savings Certificates to an aggregate amount exceeding One Thousand Dollars.
Date
Signature of Owner
SPACE FOR REGISTRATION
Office Number
Registration Number
FOLD HERE
3
AFFIX ONLY
$5.00 WAR SAVINGS
CERTIFICATE STAMP
SERIES OF 1918
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CERTIFICATE STAMP
SERIES OF 1918

THE TORCH OF LIBERTY

15

AFFIX ONLY
$.15 WAR SAVINGS
CERTIFICATE STAMP
SERIES OF 1918

THE TORCH OF LIBERTY

16

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$.16 WAR SAVINGS
CERTIFICATE STAMP
SERIES OF 1918

THE TORCH OF LIBERTY

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CERTIFICATE STAMP
SERIES OF 1918

THE TORCH OF LIBERTY

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$.18 WAR SAVINGS
CERTIFICATE STAMP
SERIES OF 1918

THE TORCH OF LIBERTY

19

AFFIX ONLY
$.19 WAR SAVINGS
CERTIFICATE STAMP
SERIES OF 1918

THE TORCH OF LIBERTY

20

AFFIX ONLY
$.20 WAR SAVINGS
CERTIFICATE STAMP
SERIES OF 1918

UNITED STATES OF AMERICA WAR-SAVINGS CERTIFICATE

CERTIFICATE

This certifies that, subject to the terms and conditions printed hereon, the owner named on the back hereof will be entitled hereunder on January 1, 1923, to receipt of such United States War-Savings Certificate Stamps of the Series of 1918 thereafter issued hereby, the amount indicated thereon as then payable, or, at his option, will be entitled to receive at any earlier date, in respect of such Stamps then affixed hereto, the lesser amount indicated in the Table printed hereon.

January 2, 1918. [illegible]

TERMS AND CONDITIONS

1. This certificate is one of a series known as the United States War-Savings Certificates Stamps of the Series of 1918 issued hereby.

2. This certificate is of no value except as the repository of such Stamps and is not negotiable.

3. Not more than twenty United States War-Savings Certificates Stamps, and only such Stamps of the Series of 1918, may be affixed hereto.

4. This certificate may be registered at any postoffice of the first, second, or third class, subject to such regulations as the Postmaster General may prescribe. Unless registered, this Certificate will not be liable to payment but may be exchanged as provided in paragraph 5.

5. This certificate, if not registered, may be exchanged at any money-order postoffice, and on January 2, 1923, at the Treasury Department in Washington, D. C., it will be payable only at the postoffice where presented for exchange, or, if registered, at the postoffice where registered. If not presented for exchange or payment as above provided on January 2, 1923, or if not presented within sixty days after receiving written demand therefor, it will be void.

6. The law provides that no one person may own at one time more than $1,000 War-Savings Certificates, or any equivalent amount exceeding One Thousand Dollars.

7. Upon payment hereof, this certificate must be surrendered, and the receipt printed hereon must be signed by the owner in the presence of an official to whom it is tendered. In case of death or disability a representative must be signed in form prescribed by the Secretary of the Treasury. Upon furnishing evidence of loss of a registered certificate satisfactory to the Secretary of the Treasury, the owner thereof shall be entitled to receive payment of the amount for which it shall have been registered.

Table showing how a War-Savings Certificate increases in value in respect of each War-Savings Certificate Stamp of the series of 1918 thereto affixed.

Month.	1918	1919	1920	1921	1922
January	4.12	4.34	4.56	4.78	5.00
February	4.13	4.35	4.57	4.80	5.02
March	4.14	4.36	4.58	4.82	5.04
April	4.15	4.37	4.59	4.83	5.06
May	4.16	4.38	4.60	4.85	5.08
June	4.17	4.39	4.61	4.87	5.10
July	4.18	4.40	4.62	4.88	5.12
August	4.19	4.41	4.63	4.90	5.14
September	4.20	4.42	4.64	4.92	5.16
October	4.21	4.43	4.65	4.93	5.18
November	4.22	4.44	4.66	4.95	5.20
December	4.23	4.45	4.67	4.97	5.22
January 1, 1923					5.25

19 Defendant's Motion to Dismiss.

To the Honorable, the Judge of the District Court of the United States for the Southern District of Iowa.

Comes now the defendant, the United States of America, by Ralph Pringle, United States Attorney for the Southern District of Iowa, and moves the Court to dismiss the petition and Amendment thereto of plaintiff and for grounds therefor shows to the Court:

1. The claim or demand set forth in the petition and amendment does not belong to the class in respect to which this court has jurisdiction under section 24 of the Judicial Code.

2. The petition and amendment do not comply with section 159 of the Judicial Code.

3. The petition and amendment fail to state facts sufficient in law or equity to constitute a cause of action.

(Sgd.) RALPH PRINGLE,
United States Attorney.

Oral argument is desired upon the part of the defendant.

(Sgd.) RALPH PRINGLE,
United States Attorney.

May 23, 1923, Copy given plaintiff's atty.

Endorsed and filed May 23, 1923, N. F. Reed, Clerk, By Gertrude Darrell, Deputy.

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21 (Second Amendment to petition.)

To the Honorable, the Judge of the District Court of the United States for the Southern District of Iowa:

Leave of court being first had, plaintiff amends his petition heretofore filed in this cause, and, by way of amendment thereof, states:

That he, the plaintiff, Sidney Mandelbaum, and the aforesaid Estella Mandelbaum, Miriam Mandelbaum, Eleanor Mandelbaum, Morris Mandelbaum and Julius Mandelbaum and each of them, are, and at all times mentioned in plaintiff's petition, have been citizens of the United States of America; that at all of said times they, and each of them, have borne

true allegiance to the Government of the United States, and that neither of them has ever in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. Further, the plaintiff states that no assignment or transfer of the claim, or any part of the claim, declared on by him, or any interest therein has been made, except as stated in his petition.

Wherefore plaintiff prays as in his original petition.

(Sgd.) HOWARD L. BUMP,
(Sgd.) JAMES C. HUME,
Attorneys for Plaintiff.

22 Verification.

State of Iowa,
Polk County—ss.

I, Sidney Mandelbaum, being first duly sworn on oath depose and say that I am the plaintiff in the above entitled cause of action; that I have read the foregoing Amendment to Petition and know the facts stated therein, and that the allegations thereof are true, as I verily believe.

(Signed) SIDNEY MANDELBAUM.

Subscribed and sworn to before me by the said Sidney Mandelbaum, this 24th day of May, A. D. 1923.

(Signed) HOWARD L. BUMP,
(Notarial seal of Howard L. Bump) Notary Public within and for Polk County, Iowa.

Endorsed and filed May 24th, 1923. N. F. Reed, Clerk. By Gertrude Darrell, Deputy.

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23 (Order granting plaintiff leave to file amendment to petition and dismissing cause.)

May 24, 1923.

Sidney Mandelbaum, Plaintiff,
No. 4222. vs. In Equity.
The United States of America, Defendant.

On this day this cause comes on for hearing, the plaintiff appearing by Howard L. Bump, his attorney, and the defendant appearing by Ralph Pringle, United States Attorney. On motion of plaintiff, it is ordered that he be, and he is hereby [grated] leave to file amendment to petition. On

motion of defendant it is ordered that this cause be, and the same is hereby dismissed at costs of plaintiff. Exceptions.

(Sgd.) MARTIN J. WADE, Judge.

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25 Petition for Appeal.

James C. Hume, and Howard L. Bump, Attorneys for Plaintiff.

Ralph Pringle, United States District Attorney, Attorney for Defendant.

To the Honorable Martin J. Wade, District Judge:

The above named plaintiff, feeling aggrieved by the decree dismissing the above entitled cause of action, rendered and entered in said cause on May 24, 1923, desires to and does hereby appeal from said decree, to the Circuit Court of Appeals of the United States for the Eighth Circuit, for the reasons set forth in the Assignment of Errors, hereto annexed and filed herewith.

To the end that such appeal may be perfected according to law, the plaintiff prays that his appeal be allowed, and that citation issue, as provided by law, and that a transcript of the record proceedings, and documents, upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order be made fixing the amount of the appeal bond to be furnished by him.

SIDNEY MANDELBAUM, Plaintiff
(Sgd.) By James C. Hume, and Howard L. Bump,
His Attorneys.

Endorsed and filed June 7, 1923. N. F. Reed, Clerk, By Gertrude Darrell, Deputy.

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26 Order Allowing Appeal.

Appeal allowed upon giving bond, as required by law, for the sum of $400.00.

June 7, A. D. 1923.

(Sgd.) MARTIN J. WADE, Judge.

Endorsed and filed June 7, 1923. N. F. Reed, Clerk, By Gertrude Darrell, Deputy.

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28 Assignment of Errors.

Comes now the plaintiff in the above entitled cause and presents and files the following Assignment of Errors upon which he will rely upon his prosecution of the appeal in said cause from the order, judgment and decree made by this Honorable Court on the 24th day of May A. D. 1923.

I.

That the District Court above named erred in sustaining defendant's Motion to Dismiss the plaintiff's petition, as amended and in ordering the cause dismissed at plaintiff's cost.

II.

That said Court erred in sustaining the defendant's motion to dismiss, and in dismissing plaintiff's cause of action upon the First ground of said Motion, that is to say:—because

"The claim or demand set forth in the petition and amendment, does not belong to the claims in respect to which this court has jurisdiction under Section 24 of the Judicial Code."

for the reason that, by said Section 24 of the Judicial Code, the District Courts of the United States have been granted and now possess concurrent jurisdiction with the Court of Claims of all claims such as the claim of the plaintiff sued on in this case.

III.

That said Court erred in sustaining the defendant's Motion to Dismiss and in dismissing plaintiff's cause of action upon the Second ground of said Motion, that is to say:—because

"The petition and amendment do not comply with Section 159 of the Judicial Code."

(a) for the reason that, said Section 159 of the Judi-
29 cial Code does not, either in express terms or by implication, apply to or cover suits, such as plaintiff's suit, brought, as this suit has been brought, under the provisions of Section 145 and the 20th paragraph of Section 24 of the Judicial Code, by a citizen of the United States of

America, and a domiciled resident of one of the States of the Union, and

(b) for the reason that, by an amendment to his petition, filed by express permission of the Court, on May 23rd, A. D. 1923, and prior to the submission of and ruling upon defendant's Motion to Dismiss, the plaintiff complied with the requirements of said Section 159 of the Judicial Code, and brought himself and his cause of action within the terms and provisions of said Section.

IV.

That said Court erred in sustaining defendant's Motion to Dismiss, and in dismissing plaintiff's cause of action, upon the Third ground of said Motion, that is to say:—because,

"The petition and amendment fail to state facts sufficient in law or equity to constitute a cause of action,"

for the following, and each of the following, reasons:

(a) For that, under the allegation of the petition, as amended, the plaintiff has made a prima facie case and is entitled to the relief demanded by him.

(b) For that, the contracts upon which the suit is based are embodied in and evidenced by the written instruments declared on by the plaintiff, and by nothing else, and, under the terms and conditions of said instruments and the allegations of his petition as amended, the plaintiff is entitled to the relief demanded by him, and

(c) For that, as appears from the facts stated in plaintiff's petition, as amended, (which facts are not denied by the defendant), the suit—one expressly authorized by the Congress of the United States—is one asking the re-execution and recovery on past due, non-negotiable, duly authorized instruments, containing express promises of the maker to pay sums certain upon terms and conditions which have all been fulfilled, which instruments were lawfully purchased and fully paid for by, and delivered to, the payees, were thereafter stolen from the payees by persons unknown, and are now lost or destroyed, said instruments and all claims and demands predicable thereon being now the property of the plaintiff.

Wherefore, The Plaintiff-Appellant Prays:—

That said decree be reversed and that said District Court for the Southern District of Iowa be ordered to enter a decree reversing its decree in the said cause.

(Sgd.) JAMES C. HUME,
(Sgd.) HOWARD L. BUMP.
Attorneys for Plaintiff-Appellant.

Endorsed and filed June 7, 1923, N. F. Reed, Clerk, By Gertrude Darrell, Deputy.

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31 Bond On Appeal.

Know All Men By These Presents:

That we, Sidney Mandelbaum, as principal, and Morris Mandelbaum, and L. T. Williams, as sureties, of the County of Polk and State of Iowa, are held and firmly bound unto the United States of America in the sum of Four Hundred Dollars ($400.00), lawful money of the United States, to be paid to it, its representatives and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 7th day of June, A. D. 1923.

Whereas, the above named Sidney Mandelbaum has prosecuted an appeal to the Circuit Court of Appeals of the United States for the Eighth Circuit, to reverse the judgment of the District Court of the United States, in and for the Southern District of Iowa, in the above entitled cause:

32 Now, Therefore, the condition of the obligation is such that if the above named Sidney Mandelbaum shall prosecute his said appeal to effect, and answer all costs if he fails to make good his plea, then this obligation shall be void; otherwise to be and remain in full force and effect.

(Sgd.) SIDNEY MANDELBAUM,
Principal.

(Sgd.) MORRIS MANDELBAUM,
Surety.

(Sgd.) L. T. WILLIAMS, Surety.

State of Iowa,
Polk County—ss.

On the 8th day of June A. D. 1923, personally appeared before me, Morris Mandelbaum and L. T. Williams respectively known to me to be the persons described in and who, as sureties, duly executed the foregoing instrument, and respectively acknowledge each for himself, that they executed the same as their free act and deed for the purpose therein set forth.

And the seureties aforesaid, being respectively by me duly sworn, each for himself, and not one for the other, says, that he is a resident and householder of said County of Polk, and that he is worth the sum of Four Hundred Dollars ($400.00) over and above his just debts and legal liability and property exempt from execution.

(Sgd.) MORRIS MANDELBAUM,
(Sgd.) L. T. WILLIAMS.

Subscribed and sworn to before me this 8th day of June A. D. 1923.

(Seal.) (Sgd.) HOWARD L. BUMP,
Notary Public in and for said county and State.

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33 Approval of Bond.

The foregoing bond is approved, both as to sufficiency and form, this 8th day of June, A. D. 1923.

(Sgd.) N. F. REED, Clerk.

Endorsed and filed June 8th, 1923, N. F. Reed, Clerk, By Gertrude Darrell, Deputy.

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34 Praecipe for Transcript.

To the Clerk of the court above named:

Please prepare transcript for the appeal of the above entitled cause to the United States Circuit Court of Appeals for the Eighth Circuit, incorporating therein a full and true copy of the record, proceedings and documents in the case, excepting only the formal portions thereof, such as the captions of the pleadings and entries and the verifications of the pleadings, that is to say, the:—

(1) Petition in Equity, filed March 17, 1923.

(2) Amendment (first) to the Petition, filed May 12, 1923.

(3) Defendant's Motion to Dismiss, filed May 23, 1923.

(4) Amendment (second) to the Petition, filed May 23, 1923.

(5) Order, Judgment and Decree granting plaintiff leave to file his second Amendment to the Petition; sustaining Defendant's Motion to Dismiss; rendering judgment against plaintiff for costs, and granting plaintiff exceptions, made and entered May 24, 1923.

(6) Plaintiff's Petition for Appeal, filed June 7, 1923, and Order, thereto subjoined, allowing Appeal and fixing amount of Appeal Bond, made and entered June 7, 1923.

(7) Plaintiff-Appellant's Assignment of Errors, annexed to and filed with his Petition for Appeal, filed June 7, 1923.

35 (8) Appellant's Bond on Appeal and Approval thereof, thereto subjoined, filed June 8, 1923.

(9) Appellant's Citation on Appeal, made and entered June 8, 1923, and Acceptance of Service thereof, thereto subjoined, and

(10) The Opinion of the United States District Court, the Honorable Martin J. Wade, District Judge, presiding, on sustaining Defendant's Motion to Dismiss, if and when filed.

Dated at Des Moines, Iowa, this 11th day of June, A. D. 1923.

(Sgd.) JAMES C. HUME,
(Sgd.) HOWARD L. BUMP,
Attorneys for Appellant.

Service of the above and foregoing Praecipe for Transcript accepted, and receipt of copy thereof acknowledged, at Des Moines, Iowa, this 11th day of June, A. D. 1923.

(Sgd.) JOHN C. De MAR,
Assistant United States District Attorney, Attorney for Defendant.

Endorsed and filed June 11, 1923, N. F. Reed, Clerk, By Gertrude Darrell, Deputy.

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36 (Clerk's Certificate to Transcript.)

United States of America,
Southern District of Iowa—ss.

I. N. F. Reed, Clerk, of the District Court of the United States for the Southern District of Iowa, hereby certify the foregoing 35 pages to contain a full, true and complete transcript of the record in the cause of Sidney Mandelbaum, Plaintiff, vs. The United States of America, Defendant, as called for by the praecipe of parts of the record filed by Appellant June 11th, 1923, as full, true and complete as the original thereof now on file and of record in office at City of Des Moines, in said District.

I further certify that I transmit herewith as part of the original printed transcript the original Citation with acceptance of service hereof by Attorneys for Appellee.

Seal
U. S. Dist. Court
So. Dist.
of Iowa.

In Witness Whereof I hereunto set my hand and affix the seal of said Court office in the City of Des Moines in said District this 18th day of July A. D. 1923.

N. F. REED,
Clerk, U. S. District Court, Southern District of Iowa.

Filed Jul 24, 1923, E. E. Koch, Clerk.

In United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1923

No. 6407

Sidney Mandelbaum, Appellant,

vs.

United States of America, Appellee

Appeal from the District Court of the United States for the Southern District of Iowa

Mr. Howard L. Bump (Mr. James C. Hume was with him on the brief), for appellant.

Mr. Ralph Pringle, United States District Attorney (Mr. John C. De Mar, Assistant United States District Attorney, was with him on the brief), for appellee.

Before Stone and Kenyon, Circuit Judges, and Phillips, District Judge

Opinion—Filed March 20, 1924

Stone, Circuit Judge, delivered the opinion of the Court.

Appellant brought this bill alleging ownership of certain unregistered War Savings Stamp Certificates (with stamps attached) which had been stolen from him and prayed reissue and payment thereof, offering to give saisfactory indemnity. A motion to dismiss the bill was filed based upon the grounds that the court had no jurisdiction to order reexecution of these securities and that no cause of action was stated. From dismissal of the bill upon this motion, plaintiff brings this appeal.

This challenge to the jurisdiction refers only to the character of relief, namely, power to require reissue or reexecution of the certificates and stamps. As the prayer is also for recovery of the value of the certificates and for general relief, the jurisdictional question may be passed without consideration until it be determined whether the bill states a right to any relief.

The parties agree that the action is based upon an express contract which is set forth. This contract is on the certificates themselves.

The contention of appellant is that the certificates being nonnegotiable, no other person could obtain any legal right to payment and, as payment is negatived, the government owes to him the amounts represented by the certificates and that equity will, on the ground of accident, set up the instruments and permit recovery thereon. The position of the appellee is that the contract ex-

pressly provides that unregistered certificates shall not be paid unless presented by the owner and surrendered at time of payment and that the clear intent of the contract was that no lost, destroyed or stolen certificates should be paid.

It is not and cannot be challenged that a contract with the meanings contended for by appellee would be legal and enforceable. Therefore, the crucial matter is construction of this contract. The parts of the Certificate pertinent to this inquiry are as follows:

"This certificate may be registered at any post-office of the first, second or third class, subject to such regulations as the Postmaster-General may prescribe. Unless registered, the United States will not be liable if payment be made to a person not the rightful owner."

"Upon payment hereof, this certificate must be surrendered and the receipt printed hereon must be signed by the owner in the presence of the official to whom surrendered. In case of death or disability, a special receipt must be signed in form prescribed by the Secretary of the Treasury. Upon furnishing evidence of loss of a registered certificate satisfactory to the Secretary of the Treasury, the owner thereof shall be entitled to receive payment of the amount for which it shall have been registered."

The requirement that "upon payment hereof, this certificate must be surrendered and the receipt printed hereon must be signed by the owner in the presence of the official to whom surrendered" is entirely consistent with appellee's contention. But this requirement is not the sole expression of intention in this respect. The privilege of registry is obviously for the purpose of protecting the owner in case of loss of a certificate, but what need thereof if the appellee is liable on unregistered certificates which may be lost? Appellant contends this superior protection afforded by registration applied only where payment had been made to another than the owner. He refers to the second sentence on the certificate (above quoted) as proof of this limitation. That contention is answered by the last sentence quoted above which refers to loss irrespective of payment. Again, the careful statement of liability on lost or paid registered certificates is strong evidence that such liability was not to attach to unregistered certificates.

It is, also, contended by appellee that this case is determined by Treasury Department Circular No. 108 relating to War-Savings Certificates. That circular contains the following:

"A War-Savings Certificate which has been lost or destroyed will not be paid nor will a duplicate thereof be issued, unless the certificate has been registered in accordance with the regulations and instructions issued by the Postmaster-General."

This circular was dated before these Certificates involved here were issued and would govern because the Act authorizing the certificates (40 St. L. 288, 291) provides that they shall be issued "* * * in such form or forms and subject to such terms and conditions,

and may have such provisions for payment thereof before maturity, as the Secretary of the Treasury may prescribe". However, appellant charges that this certificate, although dated before these certificates were issued was not in fact put out until they had been issued. Because of our view that the certificates themselves sustain the position of appellee and support the trial court, we think it unnecessary to solve this question concerning the circular.

The decree is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

DECREE

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Iowa and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

March 20, 1924.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR APPEAL

To the Honorable Judges of the Circuit Court of Appeals of the United States, for the Eighth Circuit:

Comes now Sidney Mandelbaum, plaintiff-appellant, by his solicitor and complains that in the record and proceedings, and also in the rendition of the Decree of the United States Circuit Court of Appeals for the 8th Circuit, setting at St. Louis in the State of Missouri, in the above styled and numbered case, on the 20th day of March, A. D. 1924, affirming the decree of the United States District Court for the Southern District of Iowa, in the said cause, manifest error has intervened to the great damage of the Petitioner.

That the jurisdiction of the United States District Court, in and for the Southern District of Iowa, and the Circuit Court of Appeals for the 8th Circuit of the United States, is dependent upon Section 136 of the Judicial Code enacted March 3rd, 1911, in effect on and since January 1st, 1912. The Court of Claims (established by Act of Congress February 24, 1856) was continued and by Section 145 it was given jurisdiction to hear and determine:

"First. All claims (except for pensions) founded upon the constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or im-

plied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable."

And by Section 24 of the Judicial Code, it is provided that:

"The district court shall have original jurisdiction as follows:

Twentieth. Concurrent with the Court of Claims, of all claims, not exceeding ten thousand dollars, founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the Court without a jury."

That the cause of action is to recover upon war savings stamps and certificates issued by the treasury of the United States; that the appeal is taken for the reasons of the errors committed, set forth in the Assignment of Errors, hereto annexed and filed herewith.

That the amount involved herein and the matter in controversy exceeds the sum of $1,000, besides costs and does not exceed $10,000, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

Wherefore, your Petitioner prays for an allowance of appeal to the end that the cause may be carried to the Supreme Court of the United States and the Petitioner prays for supersedeas of the said decree and such other processes as is required to perfect the appeal prayed for to the end that the error therein may be corrected.

Sidney Mandelbaum, Plaintiff, by Howard L. Bump, James C. Hume, His Attorneys.

In United States Circuit Court of Appeals

Assignment of Errors—Filed June 18, 1924

Comes now the plaintiff-appellant in the above entitled cause and presents and files the following assignment of errors on which he will rely on the prosecution of his appeal in the said cause from the Order, adjudged and made by this Honorable Court on the 20th day of March, A. D. 1924.

I

The Circuit Court of Appeals above named, erred in sustaining the defendant's motion to dismiss the plaintiff's petition as amended and in ordering the cause dismissed, thereby affirming the order and judgment of the District Court of the United States in and for the Southern District of Iowa.

II

The said court erred in affirming the judgment of the District Court of the United States, in and for the Southern District of Iowa, in sustaining the defendant's motion to dismiss, and in dismissing the plaintiff's cause of action upon the first ground of the motion, that is to say: because

"The claim or demand set forth in the petition and amendment, does not belong to the claims in respect to which the court has jurisdiction under Section 24 of the Judicial Code."

for the reason that, by said Section 24 of the Judicial Code, the District Courts of the United States have been granted and now possess concurrent jurisdiction with the Court of Claims of all claims such as the claim of the plaintiff sued on in this case.

III

The said Circuit Court erred in affirming the judgment of the District Court of the United States, in and for the Southern District of Iowa, thereby sustaining the defendant's motion to dismiss and in dismissing the plaintiff's cause of action upon the second ground of the said action, that is to say: because,

"The petition and amendment do not comply with Section 159 of the Judicial Code."

(a) for the reason that, said Section 159 of the Judicial Code does not, either in express terms or by implication, apply to or cover suits, such as plaintiff's suit, brought, as this suit has been brought, under the provisions of Section 145 of the 20th paragraph of Section 24 of the Judicial Code, by a citizen of the United States of America, and a domiciled resident of one of the States of the Union, and

(b) for the reason that, by an amendment to his petition filed by express permission of the Court, on May 23rd, A. D. 1923, and prior to the submission of and ruling upon defendant's Motion to Dismiss, the plaintiff complied with the requirements of said Section 159 of the Judicial Code, and brought himself and his cause of action within the terms and provisions of said Section.

IV

That the Honorable Court erred in affirming the judgment of the District Court of the United States, in and for the Southern District of Iowa, thereby sustaining defendant's motion to dismiss and in dismissing, the plaintiff's cause of action, upon the third ground of the said motion, that is to say; because,

"The petition and amendment fail to state facts sufficient in law or equity to constitute a cause of action,"

for the following, and each of the following, reasons:

(a) For that, under the allegation of the petition, as amended, the plaintiff has made a prima facie case and is entitled to the relief demanded by him.

(b) For that, the contracts upon which the suit is based are embodied in and evidenced by the written instruments declared on by the plaintiff, and by nothing else, and, under the terms and conditions of said instruments and the allegations of his petition as amended, the plaintiff is entitled to the relief demanded by him, and

(c) For that, as appears from the facts stated in plaintiff's petition, as amended (which facts are not denied by the defendant), the suit—one expressly authorized by the Congress of the United States—is one asking the re-execution and recovery on past due, non-negotiable, duly authorized instruments, containing express promises of the maker to pay certain sums upon terms and conditions which have all been fulfilled, which instruments were lawfully purchased and fully paid for by, and delivered to, the payees, were thereafter stolen from the payees by persons unknown, and are now lost or destroyed, said instruments and all claims and demands predicable thereon being now the property of plaintiff.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER ALLOWING APPEAL—Filed June 18, 1924

On motion of Howard L. Bump, Esq., Solicitor and Counsel for the Complainant, it is hereby ordered that an appeal to the Supreme Court of the United States, from the Decree heretofore filed and entered herein March 20th, 1924, be and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed in the sum of $500.00, and that the bond now presented, dated the 17th of

June, A. D. 1924, and wherein Morris Mandelbaum and George E. Smith are sureties, is approved.

Kimbrough Stone, U. S. Circuit Judge.

Dated at St. Paul, Minnesota, June 18, A. D. 1924.

[File endorsement omitted.]

Bond on Appeal for $500—Approved and filed June 18, 1924; omitted in printing

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In the United States Circuit Court of Appeals, Eighth Circuit

Citation—In usual form, showing service on Ross R. Mowry; filed June 21, 1924; omitted in printing

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In United States Circuit Court of Appeals

Præcipe for Transcript of Record—Filed June 21, 1924

To the Clerk of the Court, above named:

Please prepare a transcript for the appeal of the above entitled cause, to the Supreme Court of the United States, and have incorporated therein a full and true copy of the records, proceedings and documents in the case, excepting only the formal portions thereof, such as captions of the pleadings and entries, and the verifications of the pleadings, that is, to say:

Pleadings and Proceedings in the United States District Court, Southern District of Iowa

(1) Petition in Equity, filed March 17, 1923.
(2) Amendment (first) to the Petition, filed May 12, 1923.
(3) Defendant's Motion to Dismiss, filed May 23, 1923.
(4) Amendment (second) to the Petition, filed May 24, 1923.
(5) Order, Judgment and Decree of District Court of the United States, Southern District of Iowa, granting Plaintiff leave to file his second Amendment to the Petition; sustaining Defendant's Motion to Dismiss; rendering judgment against plaintiff for costs, and granting plaintiff exceptions, made and entered May 24, 1923.
(6) Plaintiff's Petition for Appeal to Circuit Court of Appeals—Eighth Circuit—filed June 7, 1923, and Order, thereto sub-joined, allowing Appeal and fixing amount of Appeal Bond, made and entered June 7, 1923.
(7) Plaintiff-Appellant's Assignment of Errors, annexed to and filed with his Petition for Appeal to United States Circuit Court of Appeals, Eighth Circuit, filed June 7, 1923.

(8) Appellant's Bond on said appeal and approval thereof, thereto subjoined, filed June 8, 1923.

(9) Appellant's Citation on said Appeal, made and entered June 8, 1923, and Acceptance of Service thereof, thereto subjoined.

Proceedings in United States Circuit Court of Appeals

(1) Judgment and Decree of the United States Circuit Court of Appeals for the 8th Circuit and Opinion, therewith, filed in this cause.

(2) Appellant's Petition for appeal to the Supreme Court of the United States, with Assignment of Errors thereto attached, filed in this court, June 18th, 1924.

(3) Order allowing the Appeal to United States Supreme Court, filed and entered June 18th, 1924.

(4) Appellant's Bond on Appeal to United States Supreme Court, filed June 18th, 1924.

(5) Citation to Defendant-Appellee, made and entered June 18, 1924, and Acceptance of Service thereof, thereto sub-joined.

Dated at Des Moines, Iowa, this 19th day of June, A. D. 1924.

Howard L. Bump, Attorney for the Appellant.

Service of the above and foregoing Præcipe for Transcript, accepted and receipt of copy thereof acknowledged, at Newton, Iowa, this 19th day of June, A. D. 1924.

Ross R. Mowry, United States District Attorney, Attorney for the Defendant.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Clerk's Certificate

United States Circuit Court of Appeals, Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Southern District of Iowa as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the præcipe of

counsel for appellant, in a certain cause in said Circuit Court of Appeals wherein Sidney Mandelbaum was Appellant and the United States of America was Appellee, No. 6407, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the twenty-third day of May, A. D. 1924, a mandate was issued out of said Circuit Court of Appeals in this cause, directed to the Judges of the District Court of the United States for the Southern District of Iowa.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this first day of July, A. D. 1924.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal United States Circuit Court of Appeals, Eighth Circuit.)

Endorsed on cover: File No. 30,507. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 542. Sidney Mandelbaum, appellant, vs. The United States of America. Filed July 17th, 1924. File No. 30,507.

(4593)

(18)

FILED
SEP
WM. R.

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

No. [redacted]139

SIDNEY MANDELBAUM, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLANT'S BRIEF AND ARGUMENT.

JAMES C. HUME, of Des Moines, Iowa AND
HOWARD L. HUMP, of Des Moines, Iowa,
Attorneys for Appellant.

Ross MOWRY, United States District Attorney, for the Southern District of Iowa, of Newton, Iowa,
Attorney for Appellee.

INDEX.

	Page
History of Case and Jurisdiction of this Court	1
Statement of Facts	3
Issues and How Decided	4
Errors Relied Upon	5

ARGUMENT.

Plaintiff's Right to Maintain Suit	7
Plaintiff's Right to Recover	8
Answer to Defense	12
"A" District Court has Power to Grant Relief Sought	16
"B" Treasury Circular not a Bar to Claim	17
Conclusion	21

TABLE OF CASES CITED.

Cited on Page

Ackley School District vs. Hall, (1885) 113 U. S., 135 10
Adrian vs. Whitney etc. Bank, (Mich. 1914) 146 N. W., 654. 10
Bagley vs. Eaton, 10 Calif., 126 14
Blackstone's Commentaries, Vol. 3, 2543 7
Bohart vs. Chamberlain, 13 S. W., 85-87 14
Cornwall vs. Sac County, (1877) 96 U. S., 51 9
Cochran vs. Fox Chase Bank, (Pa. 1904) 56 Atl., 117 10
Clark vs. Iowa City, (1874) 20 Wal., 583-589 10
Clapp vs. Cedar County, 5 Ia., 15 10
Callehan vs. Brown, 31 Ia., 333-337 10
Cyc., Vol. 25, p. 1608 14
Corpus Juris, Vol. 13, p. 591 21
Fifth Ward Savings Bank vs. Jersey City First Natl. Bank, 7 Atl., 318 10
Frank vs. Wessels, 64 N. Y., 155 14
Griffith vs. Burden, 35 Ia., 138-142 10
Hotchkins vs. National Bank, (1874) 20 Wall, 354 9
Homberg vs. Kickhoffer, (Minn.) 45 N. W., 154 14
Iowa Statutes, Code 1897, Sec. 3427 14
Kerney vs. Kerney, 20 Am. Dec. 213-214 14
Murray vs. Lardner, (1864), 2 Wall, 110-118 9
Morgan vs. United States, (1884) 113 U. S., 476 9
Manhattan Savings Inst. vs. New York etc. Bank, (N. Y. 1902) 62 N. E., 1079 10
Miles vs. Stevens, 3 Pa. St. 21; 45 Am. Dec. 621-630 20
McFadden vs. U. S., 213 U. S., 288 2
Pomeroy's Equity (4th Ed.), Sec. 831, Sec. 832 13
Ruling Case Law, Vol. 17, Sec. 13, p. 1176 14
Ralston vs. C. P. N. & E. R. R. Co., 47 N. Y. Supp., 650 15
Stanley vs. Schwally, 162 U. S., 255 7
Southern Pacific Co. vs. Stewart, 245 U. S., 359-62 2
In re John G. Sprieker, 54 Court of Claims, R. 223 24
Trustees etc. vs. Lewis, (Fla. 1894), 16 So., 325 10
Texas vs. White, (1886), 7 Wal, 700-735 10
Thorpe Bros. vs. Dickey, 51 Ia., 676-678 11
United States vs. Raine-Andrews Lumber Co., 262 Fed. 787. 8
United States vs. Jones, 131 U. S., 1 16
U. S. vs. Hartwell, 6 Wal., 385-393 21
N. Y. & O. S. S. vs. United States, 202 Fed., 311 22
United States vs. Rossi, 268 Fed., 620 23

United States vs. Sacks, 257 U. S., 37; 66 L. Ed., 118 24
United States vs. Jannowitz, 257 U. S., 42; 66 L. Ed., 120 .. 24
Vermilye & Co. vs. Adams Express Co., (1874), 88 U. S., 138 10

UNITED STATES STATUTES CITED.

Sec. 136, Judicial Code 1, 7, 22
Sec. 145, Judicial Code 22
Sec. 24, Judicial Code 1, 5, 7, 22
Sec. 128, Judicial Code 2
Sec. 14, Amendment to Judicial Code, Approved Feby. 13, 1925 2
Sec. 148, Criminal Code 23

LIBERTY LOAN ACTS.

Ch. 4, 40 S. at L., 35 23
Ch. 56, 40 S. at L., 288 23
Ch. 44, 40 S. at L., 502 23
Ch. 142, 40 S. at L., 844 23
Ch. 176, 40 S. at L., 965 23
Ch. 359, 24 S. at L., 505 22
Ch. 100, 40 S. at L., 1309 23
Ch. 122, 10 S. at L., 612 22
Also found:
U. S. Comp. Sts. of 1918, Sec. 6829-e to 6829-q 22
U. S. Comp. Sts. of 1923, Sec. 6829-iii to 6829-gggg 22

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1924.

No. 542.

SIDNEY MANDELBAUM, *Plaintiff-Appellant,*

vs.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

APPELLANT'S BRIEF AND ARGUMENT.

MAY IT PLEASE THE COURT:

Opinion below
Reported 298 Fed 295

I.

HISTORY AND STATEMENT OF THE CASE AND QUESTIONS INVOLVED.

This is a suit in equity against the United States of America, brought by permission of the Congress of the United States, expressly granted by Section 145 and the 20th paragraph of Section 24 of the Judicial Code, for the re-execution, and for an order of payment, of lost United States War Savings Stamp Certificates.

By Section 136 of the Judicial Code, enacted March 3rd, 1911 in effect on and since January 1st, 1912, the court of claims (established by Act of Congress, February 24th, 1856), was continued and, by Section 145, was given jurisdiction to hear and determine all claims (except for pensions) founded upon any contract with the government of the United States, or for damages, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, if the United States were suable.

By Section 24 of the same code the District Court is given original jurisdiction, concurrent with the Court of Claims, of all claims, not exceeding ten thousand dollars, founded upon any contract with the government of the United States, or for damages, liquidated, or unliquidated, in cases not sounding in tort.

Plaintiff's claim is for $5300.00. It is founded upon express written contracts with the Government of the United States. It is a claim on which the plaintiff would be en-

titled to redress against the United States, if the United States were suable. His right to submit the claim to the District Court, and the jurisdiction of the District Court to hear and determine it, is, therefore, authorized by law.

The suit was originally brought in the District Court of the United States in and for the Southern District of Iowa, and was determined upon motion of the defendant-appellee to dismiss because the bill did not state a cause of action, the motion being sustained. Upon appeal to the Circuit Court of Appeals for the Eighth Circuit, the judgment of the District Court was affirmed, without costs to either party. (Transcript Page 25).

On June 18th, 1924, and within the ninety days allowed by law, an appeal to this the Supreme Court was granted by the Honorable Kimbrough Stone, United States Circuit Judge (Transcript Page 28). The appeal was duly perfected by filing bond (Transcript Page 29) and the issuance and service of citation upon counsel for appellee, (Transcript page 29). The record, duly certified by the Clerk of the Circuit Court of Appeals, was filed in the Supreme Court on July 17th, 1924, (Transcript page 31).

The case is not one in which the decree or judgment of the Circuit Court of Appeals is final and is not one of those excepted by Section 128 of the Judicial Code, viz., cases arising under the patent, trade mark, copyright, revenue, or criminal laws, or in admiralty, but, on the contrary, is one in which the jurisdiction of the District Court of the United States is expressly conferred by an Act of Congress which permits a citizen of the United States to sue the United States upon claims for less than $10,000, and is one of a class often reviewed by the Supreme Court of the United States. (See, *McFadden vs. U. S.*, 213 U. S. 288); *Southern Pacific Co., vs. Stewart*, 245 U. S. Sup. Ct. 359; 62 L. Ed. 345).

Further, the case, having been appealed and pending in the Supreme Court of the United States since July 17, 1924, is not affected by the act, in amendment of the Judicial Code, approved February 13th, 1925, which further defines the jurisdiction of the Circuit Court of Appeals and of the Supreme Court, as Section 14 of that Act provides that:

> "This act shall take effect three months after it is approved but shall not affect cases then pending in the Supreme Court nor shall it affect the right to review or the mode or time for the exercising of same as respecting any judgment or decree entered prior to the date it takes effect."

The appeal, therefore, is properly taken and this court has jurisdiction of the case with the right and duty to hear and determine it.

THE FACTS.

The facts pleaded by the plaintiff, and, by filing and standing upon the rule of the lower court upon its motion to dismiss, admitted by the defendant, are few and simple.

The $5300.00, par value, of WAR SAVINGS STAMP CERTIFICATES and WAR SAVING STAMPS, declared on are of the kind sold generally during the year 1918 throughout the land by the United States Government, as one of the methods used to finance the war with Germany. They are of those known as "Series A" of the Series of 1918, dated January 2nd, 1918, payable January 1, 1923, and were purchased in April, 1918, by various members of the Mandelbaum family, a family now and for many years engaged in the retail dry-goods business at Des Moines, Iowa.

At the solicitation of the defendant, and in response to earnest and oft repeated appeals of its Secretary of the Treasury, and its officials and agents, and through organizations of its patriotic citizens for the purpose of selling Liberty Bonds and War Savings Stamps, the plaintiff and his assignors purchased through the defendant's fiscal agent at Des Moines, Iowa, namely, the Iowa National Bank, War Savings Stamp Certificates and Stamps, as follows:

J. Mandelbaum & Sons, a corporation, 10 Certificates, with 20 War Savings Stamps attached to each, making a total par value of $1,000.00

Morris Mandelbaum, 10 Certificates, with 20 War Savings Stamps attached to each, of the par value of $1,000.00

Julius Mandelbaum, 10 Certificates, with 20 War Savings Stamps attached to each, total par value of $1,000.00

Estella Mandelbaum, 10 Certificates, with 20 War Savings Stamps attached to each, total par value of $1,000.00

Miriam Mandelbaum, and Eleanor Mandelbaum, Plaintiff's children, 3 Certificates, with 20 War Savings Stamps attached to each, total par value of ..... $ 300.00

Sidney Mandelbaum, the plaintiff, 10 Certificates, with 20 War Savings Stamps attached to each, total par value of $1,000.00

making a total of $5,300.00

Having purchased said Certificates and Stamps, EACH OF THE PURCHASERS ENDORSED UPON EACH CERTIFICATE THE PURCHASER'S NAME AND ADDRESS IN THE BLANK SPACE LEFT ON EACH CERTIFICATE FOR THAT PURPOSE.

For convenience, to obviate the necessity of seven (7) separate suits, after the date of their maturity, these certificates were assigned and transferred to Sidney Mandelbaum, the plaintiff in the case, or, rather, perhaps to be more accurate, the causes of action predicated thereon were so assigned and transferred.

After the certificates and stamps were purchased, as above related, they were placed in a strong box and put in the vault located upon the fourth floor of the business house of J. Mandelbaum & Sons, where other valuables were kept. The said business house maintains a night watchman and janitor on duty during the hours when the store is closed. In the early morning of April 3, 1922, between the hours of one and four o'clock, persons unknown broke into the store, overpowered the janitor and the night watchman, broke open the safe and carried away its contents, among which were the War Savings Certificates and Stamps above described. Since then, nothing has been heard of the Certificates or of the burglars, although diligent efforts were made to find them. Shortly after, the general postoffice of the United States at Washington, D. C., and the postoffice at Des Moines, Iowa, and each postoffice in the United States through which War Savings Stamps are redeemable, were notified of the theft and loss of the Certificates and Stamps above described, giving numbers and description of the same, but so far as the plaintiff knows, nothing has been heard of their whereabouts, if they still exist, and the plaintiff has been unable to locate them after diligent search.

THE ISSUES.

To plaintiff's petition setting up these facts, offering, if the court sees fit to require it, to give an indemnity bond to protect the defendant against any possible damage resulting from the payment of the certificates to him, and praying for re-execution of the certificates and an order for their payment, the defendant filed a demurrer, or rather a motion to dismiss, in the following words:

> 1. The claim or demand does not belong to the class in respect to which this Court has jurisdiction under Section 24 of the Judicial Code.
>
> 2. The petition and amendment do not comply with Section 159 of the Judicial Code.
>
> 3. The petition and amendment fail to state facts sufficient in law or equity to constitute a cause of action.

On May 24, 1923, this motion was sustained and the cause dismissed, to which ruling the plaintiff asked and was granted an exception.

The first ground of the motion was not urged in the Court below, nor could it have been with any plausibility, as a reading of the first paragraph Section 145 and the twentieth paragraph of Section 24 of the Judicial Code will show. Neither was, nor, in our opinion, could the second ground of the motion have been urged with any possibility of success. As a matter of fact, it was abandoned, after the filing by the plaintiff, by permission of court, of the second amendment to his petition, pleading his citizenship and loyalty to the United States and the citizenship and loyalty of the original purchasers and owners of the certificates, thereby complying fully with every requirement of Section 159 of the Judicial Code, if applicable to the case. The only questions for determination on this appeal, therefore, are such as are raised by the third paragraph of defendant's motion, viz.: whether or not as a matter of law, the plaintiff, upon the facts stated in his petition as amended, is entitled to re-execution of the War Saving Stamp Certificates, and to an order for payment of the amount due him thereon.

II.

ERRORS RELIED UPON.

The errors of the Circuit Court of Appeals relied upon for a reversal of the case are saved and set forth in the second, third and fourth paragraphs of Appellant's Assignment of Errors (See, Transcript of Record, pages 26, 27, and 28), which are as follows:

The said court erred in affirming the judgment of the District Court of the United States in and for the Southern District of Iowa, in sustaining the defendant's motion to dismiss and in dismissing the plaintiff's cause of action:

A.

Upon the first ground of said motion, that is to say: because,

> "The claim or demand set forth in the petition and amendment does not belong to the claims in respect to which the court has jurisdiction under Section 24 of the Judicial Code,"

for the reason that, by said Section 24 of the Judicial Code, the District Courts of the United States have been granted and now possess concurrent jurisdiction with the Court of Claims, of all claims such as the claim of the plaintiff sued on in this case.

B.

Upon the second ground of said motion, that is to say: because,

"The petition and amendment does not comply with Section 159 of the Judicial Code."

(a) For the reason that said Section 159 of the Judicial Code does not, either in express terms or by implication, apply to or cover suits, such as plaintiff's suit, brought, as this suit has been brought, under the provisions of Section 145 of the 20th paragraph of Section 24 of the Judicial Code, by a citizen of the United States of America, and a domiciled resident of one of the states of the Union, and,

(b) For the reason that, by an amendment to his petition, filed by express permission of the court on May 23rd, 1923, and prior to the submission of and ruling upon defendant's motion to dismiss, the plaintiff complied with the requirements of said Section 159 of the Judicial Code and brought himself, and his cause of action within the terms and provisions of said Section.

C.

And upon the third ground of said motion, that is to say: Because

"The petition and amendment failed to state facts sufficient in law or equity to constitute a cause of action,"

for the following and each of the following reasons:

(a) For that, under the allegations of the petition, as amended, the plaintiff has made a *prima facie* case and is entitled to the relief demanded by him,

(b) For that the contracts upon which the suit is based are embodied in and evidenced by the written instruments declared on by the plaintiff and by nothing else, and, under the terms and conditions of said instruments, and the allegations of his petition, as amended, the plaintiff is entitled to the relief demanded by him, and,

(c) For that, as appears from the facts stated in plaintiff's petition, as amended (which facts are not denied by the defendant), the suit—one expressly authorized by the Congress of the United States—is one asking the re-execution of and recovery on past due, non-negotiable, duly authorized instruments, containing express promises of the maker to pay certain sums upon terms and conditions which have all been fulfilled, which instruments were lawfully purchased and fully

paid for by, and delivered to, the payees; were thereafter stolen from the payees by persons unknown, and are now lost or destroyed, said instruments, and all claims and demands predicable thereon, being now the property of the plaintiff.

III.

ARGUMENT.

FIRST, PLAINTIFF'S CASE.

I.

Plaintiff's Right to Maintain the Suit.

As in England, from which our common law derives, the KING can not be sued in his own courts without his consent, so, in this Country, THE GOVERNMENT, without its consent, can not be sued in any of its Courts. See, *Stanley vs. Schwally*, 162 U. S. 255, 271, decided in 1896. But, as in England, by *petition de droit*, or by *monstrans de droit*, a wrong, done by the King to one of his subjects, may be redressed in his courts (See 3 Bl. Com. 2543), so also, now, by authority of the Congress, a wrong done by the United States may, upon petition, be redressed by its courts.

1. By section 136 of the Judicial Code, enacted March 3, 1911, in effect on and since Jan. 1, 1912, the court of claims (established by act of Congress of February 24, 1856) was continued, and by Section 145, it was given jurisdiction to hear and determine:

> "First, All claims (except for pensions) founded upon the constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable"

And by Sec. 21 of the Judicial Code, it is provided that:

> "The district courts shall have original jurisdiction as follows:
>
> * * * *
>
> Twentieth. Concurrent with the Court of Claims, of all claims, not exceeding ten thousand dollars, founded upon the Constitution of the United States or any law of

> Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the Court without a jury."

Plaintiff's claim does not exceed ten thousand dollars. It is founded upon an express contract with the Government of the United States. It is a claim on which the plaintiff would be entitled to redress against the United States, if the United States were suable. His right to submit the claim to the District Court, and the jurisdiction of the District Court to hear and determine it, is, therefore, clearly authorized by the law.

II.

Plaintiff's Right to Recover.

As is said by a well-known federal judge, in a recent case (*U. S. vs. Raine-Andrews Lumber Co.*, 262 Fed. 787, on page 501), it is;

> "The very general and very proper understanding that the government will never knowingly do wrong or injustice to any of its citizens".

That plaintiff and his assignors bought and paid for the War Saving Stamp Certificates and Stamps in suit; that the certificates were, when the suit was commenced, and are now, due and collectible; that they have not been paid, and that the plaintiff is the owner of them, are sworn allegations of the petition, and none of them is controverted by the defendant.

When stolen, each of the certificates bore upon its frontis page a certificate in the following words:

> "Subject to the terms and conditions printed hereon, the owner named on the back hereof will be entitled to receive, on January 1, 1923, in respect of each United States War Saving Certificate Stamp of the Series of

1918, then affixed hereto, the amount indicated thereon as then payable."

The terms and conditions, *and the only terms and conditions* printed upon them were these:

1. This certificate is not a valid obligation unless a United States War Savings Certificate Stamp of the Series of 1918 is affixed hereto.
2. This certificate is of no value except to the owner named hereon, and is not transferable.
3. Not more than twenty United States War Savings Certificate Stamps, and only such stamps of the series of 1918, may be affixed hereto.
4. This certificate may be registered at any post-office of the first, second or third class, subject to such regulations as the Postmaster General may prescribe. Unless registered, the United States will not be liable if payment be made to a person not the rightful owner.
5. This certificate, if not registered, is payable at any money-order post-office, and on January 1, 1923, at the Treasury Department in Washington, but if registered is payable only at the post-office where registered. No post-office, however, is required to make payment, either on January 1, 1923, or any other date, until ten days after receiving written demand therefor.
6. The law provides that no person shall at any one time hold War Savings Certificates to an aggregate amount exceeding One Thousand Dollars.
7. Upon payment hereof, this certificate must be surrendered and the receipt printed hereon must be signed by the owner in the presence of the official to whom surrendered. In case of death or disability, a special receipt must be signed in form prescribed by the Secretary of the Treasury. Upon furnishing evidence of loss of a registered certificate satisfactory to the Secretary of the Treasury, the owner thereof shall be entitled to receive payment of the amount for which it shall have been registered.

It is the established law, not only of the federal courts but of state courts generally throughout the land, that the purchaser of a stolen *negotiable* bond, who buys in good faith and before maturity, acquires title thereto, even as against him from whom it was stolen. See:

Murray vs. Lardner (1864), 2 Wall. 110, 118;
Hotchkins vs. National Bank, (1874), 20 Wall. 354;
Cornwell vs. Sac County (1877), 96 U. S. 51;
Morgan vs. United States (1884), 113 U. S. 476;

Ackley School District vs. Hall (1885), 113 U. S. 135;
Fifth Ward Savings Bank vs. Jersey City 1st Nat. Bank, (1886), 7 Atl. 318;
Trustees, etc. vs. Lewis (Fla. 1894), 16 S. 325;
Manhattan Savings Inst. vs. New York etc. Bank (N. Y. 1902), 62 N. E. 1079;
Cochran vs. Fox Chase Bank (Pa. 1904), 56 Atl. 117;
Adrian vs. Whitney, etc. Bank (Mich. 1914), 146 N. W. 654.

So also:

"Coupons, when severed from the bonds, are negotiable and pass by delivery. They then cease to be incidents of the bonds and become in fact independent claims; they do not lose their validity, if for any cause the bonds are cancelled or paid before maturity; nor their negotiable character; nor their ability to support separate actions; and the amount for which they are issued draws interest from its maturity. They, then, possess the essential attributes of commercial paper, as has been held by this court in repeated instances."
Clark vs. Iowa City, (1874), 20 Wal. 583, 589.

But past due notes and bonds are non-negotiable and can not be transferred free from equities.
Texas vs. White (1886), 7 Wal. 700, 735;
Vermilye & Co. vs. Adams Express Co. (1874), 88 U. S. 138.

In the words of Chief Justice Chase, in the Texas case cited:

"Purchasers of notes and bonds past due take nothing but actual right and title of the vendors."

The law of Iowa is in full accord with these authorities. See:
Clapp vs. Cedar County, 5 Ia. 15;
Callahan vs. Brown, 31 Ia. 333, 337;
Griffith vs. Burden, 35 Ia. 138, 142.

So, had the certificates in suit been negotiable, no doubt innocent purchasers who purchased them from the thieves before maturity, could hold them, even as against the true owners.

NONE OF THE CERTIFICATES WAS NEGOTIABLE.

But none of them was negotiable; each of them is expressly made "non negotiable," and each was so labelled when placed upon the market by the United States, and when purchased by the Mandelbaums, and is so labeled now, if it is still in existence. Not only this:

EVERY CERTIFICATE WAS NONTRANSFERABLE.

A transfer of the certificates, by the original purchasers, is *expressly forbidden by the certificates themselves.*

AN ATTEMPT TO TRANSFER WOULD BE A CRIME.

There is still another reason why the thieves could not, and have never been in a position to, pass title to the certificates. If transferable at all, the certificates could only have been transferred by the written assignment or endorsement of the original purchasers. They could not pass by delivery only. A transfer, or attempted transfer, by the thieves could be accomplished only by a crime, that is, by forgoing the names of the original purchasers. And no title, even to negotiable paper, can be transferred by forgery. This is elementary. As said by the Supreme Court of Iowa:

> "Where a person has obtained possession of a promissory note belonging to another person, and, without authority, undertakes to transfer it by endorsing it in the name of the owner * * * the transferee would acquire no title to it."
>
> *Thorpe Bros. vs. Dickey*, 51 Ia. 676-678.

The only conceivable way in which the thieves may have realized, or could realize, anything upon the stolen certificates is this. Although practically impossible to do so without leaving traces of their work, they might possibly have been able to remove the stamps from the certificates without apparent injury to them, by tearing, or cutting, or soaking them off, and, having bought from the government new certificates, each with a new five dollar stamp pasted upon it, and having pasted nineteen of the ravished stamps on each of these new certificates, they may have sold the instrument, thus cunningly fabricated, to some blind or very unsuspicious person, or cashed it through some careless government clerk. But all this is highly improbable and speculative in the extreme; is outside of the issues of the case, and no evidence of such a performance on the part of the thieves appears. The plaintiff's case, as stated in his petition, is complete, and every al-

legation of his petition is admitted by the defendant. If the defendant has any evidence of payment of the stamps, which plaintiff bought, and paid for, and pasted upon the certificates furnished him by the government for this purpose, *it is for the defendant, not for the plaintiff, so to plead and prove.*

"Unless registered, the United States will not be liable if payment be made to a person not the rightful owner." So says the certificates. Granted. Granted, also, that the certificates were not registered. *But there is no proof of payment to any one.* On the contrary, the plaintiff alleges, and the defendant admits, that the money due upon them is past due, unpaid and owing to plaintiff.

SECOND, DEFENDANT'S CASE.

Having stated thus briefly, but, we trust, clearly, our reasons for a reversal of the order of the lower court dismissing the case, it might be well, before closing, to consider the ground upon which the lower court denied the plaintiff the relief prayed for by him. As already shown, printed upon the back of the certificates in suit, under the heading, "Terms and Conditions", are the following provisions:

> "This certificate may be registered at any post-office of the first, second, or third class, subject to such regulations as the Postmaster General may prescribe. Unless registered, the United States will not be liable if payment be made to a person not the rightful owner."

And:

> "Upon payment hereof this certificate must be surrendered and the receipt printed hereon must be signed by the owner in the presence of the official to whom surrendered."

These are the provisions which, in the opinion of the lower court, prevents recovery by the plaintiff, the court holding that, because of them, receipt of payment *upon the certificates themselves,* and *an actual physical surrender of the certificates,* are conditions precedent to recovery, and, plaintiff being unable to give such a receipt and make such surrender, therefore, he can not recover. There are several reasons why, in our humble judgment, this conclusion is untenable:

First: The suit is a suit in equity, seeking re-execution of, and recovery upon, lost instruments. Re-execution, either actual or constructive, is essential to recovery. It must be granted and obtained before recovery can be had upon the instruments. If, and as, the plaintiff has shown himself en-

titled to re-execution, re-execution should be decreed. Thereupon, the re-executed instruments take the place of the lost instruments, possessing all their force and virtue. In law, and to all intents and purposes, the lost instruments are thereupon again in existence, and, when paid, they may be "surrendered", and "the receipt printed thereon" may be signed by the owner, thus and thereby, in reality, if not literally, complying with the provision printed upon them.

Second: The provision, "Upon payment hereof this certificate must be surrendered," endorsed upon the certificates, is not a condition precedent to their payment. Neither is it of the essence of the contract. It was embodied in the contract for one purpose only, namely, for the protection of the maker—protection which, if regarded by the court as necessary and proper, the owner now offers to furnish by an indemnity bond.

Third: If the position taken by the lower court be correct, no recovery can ever be had upon any lost written promise to pay, for every such instrument is, *either expressly or impliedly*, payable only upon surrender.

These propositions seem so self-evident and so unassailable that a mere statement of them should suffice, without the citation of authorities in their support, but authorities in their support are readily available. For example:

1.

As said by Dr. Pomeroy:

> "It has long been settled that courts of equity have jurisdiction of suits brought to recover the amount due on lost bonds and other sealed instruments."
>
> *Pomeroy's Equity*, §831.

And, as stated by the same great jurist, upon the authority of many adjudicated cases:

> "Able judges have denied that the equitable jurisdiction extends to suits upon non-negotiable instruments and other unsealed contracts, since an action at law could always be maintained, and no indemnity was necessary. The jurisdiction is sustained, however, by the decided weight of authority, in suits upon lost non-negotiable instruments and simple contracts, as well as in suits upon negotiable and sealed instruments."
>
> *Pomeroy's Equity*, §832.

Indeed, as said by Mr. Justice Sherwood, of the Supreme Court of Missouri, speaking officially:

> "One of the most common interpositions of equity is in the case of lost deeds and instruments. A court of equity, in case of an instrument which affects the title or affords a security, will direct re-execution to be made. * * * An accident is one of the most ancient foundations of equitable jurisdiction. So that, even if a remedy could be had at law, this would not oust the original jurisdiction of a court of equity."
>
> *Bohart vs. Chamberlain*, 13 S. W. 85, 87.

It might not be inappropriate to mention incidentally here, that in the courts of Iowa, in which state the cause of action at bar arose, by a provision of the code:

> "The plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity before the adoption of this code had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive."
>
> *Code of Iowa*, Section 3427.

2.

Also, it is a settled principle that the effect of establishing in equity a lost instrument is to restore the instrument to its orignal force. As said by Justice Carr of the Supreme Court of Virginia:

> "What is the meaning of the phrase that equity will set up a lost bond, or other instrument? I understand it to mean, that the instrument will be restored to its pristine vigor and power; that the accident will be relieved against, the loss supplied."
>
> *Kerney vs. Kerney*, 20 Am. Dec. 213-214.

AND THE LOSS OR DESTRUCTION OF A PROMISSORY NOTE IN NO WAY AFFECTS THE LIABILITY OF THE MAKER OF IT.

25 Cyc. 1608;
17 R. C. L. Sec. 13, page 1176;
Bagley vs. Eaton, 10 Cal. 126;
Homberg vs. Kikhoffer, (Minn.), 45 N. W. 154.

3.

In *Frank vs. Wessels*, 64 N. Y. 155, suit was brought upon a written instrument which had been stolen from the owner. The instrument, signed by the defendant, read as follows:

"New York, February 4, 1871.

Received from Straut Bros. for account of Mr. W. Feist, carpenter, of Greytown, Nicaragua, twenty-four hundred and ninety-six, twenty-six one hundredths dollars, paper currency, which I promise to pay to said W. Feist, or to his order, *on the return of this receipt,* with seven per cent per annum interest.

$2496.26, paper currency."

After deciding that the instrument was a negotiable one, in the response to the contention that no recovery could be had upon it unless and until it was returned to the maker, the court, Chief Justice Church, voicing the unanimous opinion of the Court, says and holds, the italics being ours:

"The words, 'on the return of this receipt,' do not make it payable upon a contingency, or constitute a condition precedent to any payment. If they did, no recovery could be had without a return of the certificate. This restriction would be implied if not expressed: it is implied in every promissory note; and there is also an implied exception, on account of mistake or accident. When these occurred courts of equity formerly enforced the obligations upon such terms of indemnity as was deemed just; and now courts of law may enforce it upon requiring the observance of the statutory indemnity. *This clause is not of the essence of the contract, but is inserted for the convenience and safety of the maker.*"

Judgment, therefore, was ordered for the owner, to take effect upon his executing to the defendant an indemnity bond.

Rolston vs. C. P. N. & E. R. R. Co., 47 N. Y. Sup. 650, follows the case last cited. It was a suit upon a lost interest coupon. The bond, of which the coupon was a part, provided for payment of interest only on "presentation and delivery of the coupons." In response to the contention that an actual production of a coupon itself was necessary, as a prerequisite to recovery, the court says:

"No reason for such a rule is advanced except the convenience to the corporation in ascertaining by the surrender of the coupons, the extent of its obligations upon its bonds, and the injustice of compelling it to accept in lieu of coupons the bond of a third party. * * * As to the effect of the clause in the bond requiring the presentation of the coupon, that does not prevent a recovery if the coupon be lost. Had the provision been included in the coupon itself it would not have had that effect."

In the Circuit Court of Appeals, two reasons were presented by defendant's counsel why the suit should be dismissed, and we assume that the same reasons will be presented and urged in this Court. The first of these was that the District Court has no power to decree a re-execution and re-issuance of War Savings Stamps and Certificates in a suit against the government; the second being that the contract entered into between the plaintiff and the United States affords him no right of recovery or relief.

The first of these reasons is an after thought, it never having been raised or suggested by counsel for the government before the case reached the Court of Appeals, and neither of them is a valid or sufficient one, as a few moments reflection will show.

A.

The District Court Has Power to Grant the Relief Sought.

In support of the proposition that, in suits against the United States, the federal district court has no equity powers, or, at least, not sufficient equity power to decree the re-execution of a lost instrument, counsel cites a solitary case, viz., the case of:

United States vs. Jones, 131 U. S. 1.

In this case it was held, Justices Miller and Field dissenting, that the Act of Congress of March 3, 1887—24 S. at l. 505, ch. 359—"to provide for the bringing of suits against the Government of the United States," does not confer upon the District Courts of the United States, or upon the Court of Claims, jurisdiction in equity *to compel the issuance and delivery of a patent for public land.* The decision is supported by a very strict construction of the statute, the Court holding that, although the statute includes claims arising out of equitable and maritime, as well as legal, demands, it provides "only for money decrees and money judgments" (p. 18). In the case at bar, although plaintiff asks for a reexecution of his lost War Savings Certificates, this is but preliminary, or incidental to the real relief prayed for by him, viz., a money decree or judgment.

The plaintiff's claims are founded upon express contracts with the Government, in respect to which he would be entitled to redress "either in a Court of law, equity, or admiralty, if the United States were suable," and he prays for "judgment, or an order for payment, for the amount due him thereon." Neither his claim, nor the relief which he seeks, is of the kind forbidden by the rule adopted in *United States vs. Jones.* On the contrary, the claim is one of those which, by

the 20th paragraph of Section 24 and Section 145 of the Judicial Code, the Federal District Courts are given "jurisdiction to hear and determine."

B.

The Treasury Department's Circular No. 8 is not a Bar to Plaintiff's Claim or Cause of Action.

The only other defense offered, and the only other reason presented by counsel for the defendant why plaintiff's claim should be denied, is based upon a ruling or order of the Treasury Department of the United States, embodied in a circular, which they say, was printed and published on January 21, 1918. They contend that;

Because the "Second Liberty Loan Act"—Section 6 of Chapter 56, of the Act of Congress of September 24, 1917—authorized the Secretary of the Treasury to issue War Savings Certificates and Stamps, "upon such terms and conditions as he may determine," and because a Treasury Department circular, called "War Savings Circular No. 8," dated January 21, 1918, (4 months before the plaintiff and his assignors purchased the Certificates and Stamps involved in the case), contained a ruling or order to the effect that;

> "A War Savings Certificate which has been lost or destroyed will not be paid, nor will a duplicate thereof be issued unless the Certificate has been registered in accordance with the regulations and instructions issued by the Postmaster General,"

and because plaintiff's Certificates were not registered; therefore, the plaintiff is not entitled to have his lost Certificates reexecuted or to recover thereon.

Let us understand clearly the nature of this defense. Under date of January 2, 1918, the United States Treasury Department issued War Savings Certificates, Series of 1918, upon "Terms and Conditions" determined by the Secretary of the Treasury, as authorized by Acts of Congress. These terms and conditions were printed upon the Certificates, and the Certificates were placed upon the market, and sold throughout the country. Thereafter, the Treasury Department adopted a new rule or order. This was printed in a circular, dated January 21, 1918, called "War Savings Circular No. 8." By placing the new rule or order alongside of Condition No. 4 of the Certificates, the conflict between the Terms and Conditions of the Certificates and the new order, is made clear;

CONDITION NO. FOUR.

"This certificate may be registered at any Postoffice of the First, Second or Third Class, subject to such regulations as the Postmaster General may prescribe. Unless registered the United States will not be liable if payment be made to a person not the rightful owner."

THE NEW RULE.

"A War Savings Certificate which has been lost or destroyed will not be paid, nor will a duplicate thereof be issued unless the Certificate has been registered in accordance with the regulations and instructions issued by the Postmaster General."

The plaintiff contends that this ruling or order of the Treasury Department, which we call "The New Rule," is not and cannot be a valid defense against plaintiff's claim, for the following reasons;

First. The plaintiff's War Savings Certificates were issued on January 2, 1918. Every certificate bears that date and shows so on its face. The Certificates, and War Savings Stamps to be attached thereto, were forthwith placed upon the market, and offered for sale to the general public, through the Government's Postmasters and other selected agents. The plaintiff's Certificates and Stamps were purchased in April, 1918, from the Iowa National Bank of Des Moines, the Government's selling agent at Des Moines. No such provision or condition as that contained in Circular No. 8 was or is among the "Terms and Conditions" printed upon the Certificates. They were complete in the form in which they are declared upon when delivered by the Government's agent and paid for by the purchasers. They embody, and are and constitute the only evidence of, the contract between the Government and the purchasers.

Second. The Congress of the United States, by Act of September 24, 1917, authorized the Secretary of the Treasury to issue and sell the War Savings Certificates and Stamps in suit, upon certain terms and conditions, and others to be determined by him. He determined to and did issue, offer and sell the Certificates in suit upon "the terms and conditions" which he printed upon them. They were purchased on these terms and conditions and upon none other. To read into these conditions, a condition of which the purchasers had no knowledge at the time they purchased, affecting materially and changing the character and value of the Certificates, would be to bind the plaintiff by an agreement which he and his assignors did not make.

Third. The "terms and conditions" upon which the plaintiff and his assignors purchased the Certificates in suit, upon which the minds of the parties met, are those written thereon, and no such rule, order or condition as that now presented

nd relied upon by defendant's counsel to defeat the plaintiff's aim, was among them. Counsel inform the Court that such rule was adopted by the Secretary of the Treasury, incorporated in and published, and may be found, in a Circular sued by the Secretary three months before they were purased by the plaintiff and his assignors from the Secretary's lling agent. This may or may not be true, but there is no legation to this effect to be found in the pleadings, and no mpetent proof, nor any proof, was or is offered in its support. Counsel are asking the Court to nonsuit the plaintiff pon information volunteered by them, upon evidence, if it ay be called evidence, *dehors* the record.

Fourth. As a matter of fact, the purchasers of the War avings Certificates and Stamps in suit did not know, and ever heard, of "War Savings Circular No. 8," or the Treasrer's order therein contained, until long after they had purased their Certificates, not, indeed, until after their Certificates had been stolen, on the morning of April 3, 1923. here is no allegation or proof of this in the record. Granted. either is there any allegation or proof in the record that they d know of the Teasurer's ruling embodied in the Circular. deed, even yet, they do not *know* that such a circular as at referred to by defendant's counsel was issued on Janry 21, 1918, nor when, if ever, such a circular was issued. ney are under the impression that a "War Savings Circular o. 8" was issued which contained no such provision as that oted by defendant's counsel, and that, thereafter, and after e dates in April, 1918, when plaintiff's Certificates were rchased, Circular No. 8, as it originally read, was amended d reprinted, with the provision relied upon by defendant's unsel incorporated therein, and, as thus amended and as now reads, promulgated for the first time. However this ay be, they know, and the Court knows—*for the record ows it*—that no such provision appears in any of the Certicates which embodies their contracts with the defendant.

Referring to the contents of War Savings Circular No. 8, page 5 of Appellee's Brief and Argument, counsel say;

> "Of these 'terms and conditions' plaintiff and his assignors had either actual or constructive notice when their securities were purchased in April, 1918."

Of actual notice, on the part of plaintiff and his assignors, the contents of Circular No. 8, there is, in the record, ither allegation nor proof, and, so far as *actual* notice of e contents of Circular No. 8 is concerned, counsel have no ore right to make such an assertion than plaintiff's counsel uld have to make the assertion (which is a true one) that aintiff and his assignors had no actual notice of its contents

until more than four years after their Certificates were purchased.

Whether or not the purchasers of the Certificates in suit had *constructive* notice of War Savings Circular No. 8, or its contents, when they bought their Certificates, is immaterial, for, even if they had, they are in no wise bound by its provisions.

In our humble judgment, the doctrine of notice—notice of any kind, either actual or constructive—has no application in the case; or, to put the proposition concretely, that, even were actual notice or knowledge shown, on the part of the purchasers, of War Savings Circular No. 8, or the rule of the Secretary of the Treasury therein announced, or even if constructive notice thereof is imputable to them, their rights, as defined in the Certificates, are in no way changed or affected thereby.

The act of Congress which authorized the Secretary of the Treasury to prepare, issue and sell the War Savings Certificates in question, empowered him to do so "upon such terms and conditions as he may determine." He determined to prepare, and did prepare, issue and sell to the Mandelbaums, through his or the Government's agent at Des Moines, certain Certificates, none of which had such a condition in them as that which he, or the defendant through him, now seeks to engraft upon them.

Further, it is an established principle of law, that third persons are in no wise chargeable with constructive notice of facts contained in public documents merely because they were acts of duly authorized agents of the Government. A leading case, recognizing this principle, was decided by the Supreme Court of Pennsylvania as early as 1846. In this case it appears that duly authenticated copies of the journal of the lower house of Congress, together with a letter of the Secretary of War, and a report of a topographical engineer, reported to the house in pursuance of a resolution, were offered in evidence as public records and as evidence of acts and doings of authorized and accredited agents of the Government and binding upon the defendant. The proffered evidence was rejected as being, "subversive of every principle of justice." Said the court:

> "Miserable indeed would be our condition, if the citizens of our wide-spread confederacy were to be affected and controlled in their contracts by a presumption of notice of a material fact, derived solely from a document of which he (the defendant) had never heard, and which, in many cases, the existence is not dreamed of by ninety-nine in a hundred."
>
> *Miles vs. Stevens*, 3 Pa. St. 21; 45 Am. Dec. 621, 630.

Further, to allow the Government's representatives at this late date, to write into plaintiff's War Savings Certificates, the provision which they now seek to write into it, would be to alter the contract which the Government made with him, and his assignors, and would force upon him a contract which he and they never entered into.

As said in Corpus Juris, upon a host of authorities;

> "One party to a contract cannot alter its terms without the assent of the other; the minds of the parties must meet as to the proposed modification."
> 13 Corpus Juris, 591.

And, as said by the Supreme Court of the United States, speaking of a Government contract;

> "The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other."
> *U. S. vs. Hartwell,* 6 Wall. 385, 393.

CONCLUSION.

For the reasons above set forth and upon the authorities cited, the appellant earnestly and confidently contends that he should be given back his money—money loaned to the government, in its need and at its solicitation, which it promised to repay on January 1st, 1923, and has not yet repaid—and that, *upon the facts before the court,* no harm would, or could possibly result to the government should it be required to do so.

He submits that, under the facts presented and admitted by the parties to the suit, *according to the law of the land,* the lower courts' orders are wrong, and that, unless a new and peculiar rule of law is to be established in suits against the government, the case must be reversed.

Respectfully submitted,
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ADDENDA.

STATUTES AND CASES TOUCHING THE SUABILITY OF THE UNITED STATES AND INVOLVING WAR SAVINGS STAMPS.

I.

SUITS AGAINST THE UNITED STATES.

The Court of Claims was established by Act of Congress of February 24, 1855, ch. 122; 10 S. at L. 612, for the investigation of claims against the United States. By Act of Congress of March 3, 1887, ch. 359; 24 S. at L. 505,—the "Tucker Act"—federal district courts as well as the Court of Claims, were, with certain limitations, given authority to hear and determine suits against the Government of the United States.

The Tucker Act was intended to give persons having claims of comparatively small amounts against the United States, the right to sue therefor in the courts of the United States in the districts in which they and their witnesses reside, without subjecting them to the expense and annoyance of litigation in a court located at Washington. See:

N. Y. & O. S. S. vs. United States, 202 Fed. 311, 312.

By Sections 136, 7 and 8 of the Judicial Code, (enacted March 3, 1911, in effect from and after January 1, 1912), the Court of Claims was continued, and by Section 145, it was given power and authority to hear and determine;

> "First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable," etc.

And by Section 24 of the Judicial Code, it is provided that;

> "The District Courts shall have original jurisdiction as follows:
>
> * * * *
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding Ten Thousand Dollars, founded upon the Constitution of the United States or any law

of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claim against the Government in said Court * * *. All suits brought and tried under the provisions of this paragraph shall be tried by the Court without a jury."

II.

LIBERTY LOAN ACTS.

The "First Liberty Loan Act" was passed April 24, 1917, Acts 65th Cong. ch. 4; 40 S. at L. 35.

The "Second Liberty Loan Act" was passed September 24, 1917, Acts 65th Cong. ch. 56; 40 S. at L. 288.

The "Third Liberty Loan Act" was passed April 4, 1918, Acts 65th Cong. ch. 44; 40 S. at L. 502.

The "Fourth Liberty Loan Act" was passed July 9, 1918, Acts 65th Cong. ch. 142; 40 S. at L. 844.

The "Supplement to Second Liberty Loan Act" was passed September 24, 1918, Acts 65th Cong. ch. 176; 40 S. at L. 965.

The "Victory Liberty Loan Act" was passed March 3, 1919, Acts 65th Cong. ch. 100; 40 S. at L. 1309.

Note. For a compilation of the first five of the above mentioned Acts of Congress, see U. S. Comp. Sts. of 1918, Sections 6829-e, to 6829-q; for a compilation of the sixth, see U. S. Comp. Sts. of 1923, Sections 6829-iii, to 6829-gggg.

III.

REPORTED CASES INVOLVING WAR SAVINGS STAMPS.

In *United States vs. Rossi*, 268 Fed. 620, decided by the United States District Court for the District of Oregon, on October 18, 1920, it was held that, when a war saving stamp certificate has been registered, the removal or erasure of the registration number, with intent to defraud, constitutes an alteration, and is a crime under Sec. 148 of the Criminal Code, but, as the serial number of a certificate which has not been registered is not material to the validity of the certificate, its

erasure does not constitute an alteration; also, that an indictment for altering or counterfeiting war saving stamp certificates cannot be predicated upon the violation of the regulations under which such certificates are issued, but solely upon provisions of the Criminal Code.

In *United States vs. Sacks*, 257 U. S. 37; 66 L. Ed. 118, decided by the Supreme Court of the United States on November 7, 1921, it was held, that tearing war saving stamps from the certificate to which they were attached, is an alteration of an obligation of the United States within the meaning of Section 148 of the United States Criminal Code, and that having such detached stamps in one's possession, with intent to pass the same, is a violation of Section 151 of the same Code.

In *United States vs. Janowitz*, 257 U. S. 42; 66 L. Ed. 120, decided by the United States Supreme Court on the same day it decided the *Sacks* case, it was held, that the power to make war savings stamp certificates and the stamps attached thereto non-transferable, was conferred upon the Secretary of the Treasury by the Acts of September 24, 1917 and September 24, 1918, which authorized the issuance of such obligations, limiting the number of certificates to be sold to or held by any one person, and entrusting the details of execution to the Secretary of the Treasury, and that persons who conspired to defraud the United States by defeating the non transferability of the certificates and stamps attached thereto, are guilty of the crime of conspiracy under Section 37 of the United States Criminal Code.

The foregoing are the only reported cases involving war saving certificates and stamps which counsel for appellant in the case at bar have been able to find, excepting the case of *John G. Speicher*, No. 34021, which, on June 9, 1919, was dismissed by the Court of Claims without revealing the issues joined, and without comment. See:

54 *Court of Claims Reports*, 223.